UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Lisa Scott, Plaintiff, v. CSL Plasma, Inc., Defendant.	Court File No. 13-CV-02616 (JNE/BRT) **PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

INTRODUCTON

There are six reasons why Defendant has failed to meet its burden of showing the absence of any material questions of fact, or otherwise shown that it is entitled to judgment as a matter of law.

1. Because the MDHR found probable cause to believe Defendant unlawfully discriminated against Scott within 8 months of receiving her amended charge of discrimination, Defendant is not entitled to a finding of prejudice per se or dismissal of Scott's case.

2. Defendant's purchase of plasma is a commercial transaction. The Minnesota legislature has not exempted Defendant from complying with the MHRA, Minn. Stat. § 363A.17, which prohibits Defendant from refusing to business with a person simply because of her gender identity/transgender

status.[1]

3. A plaintiff alleging refusal-to-do-business discrimination under the MHRA needn't prove the existence of a contract. That element of proof applies only to claims alleging discrimination that arises in the terms or performance of a contract.

4. Defendant has failed to show the absence of any evidence showing discriminatory motive. Indeed, the record contains direct evidence of discrimination. To wit, the person solely responsible for Defendant's refusal to do business with Scott admitted the decision was based upon Scott's transgender status. The evidence also shows that Defendant was not acting pursuant to any FDA guidance or then-existing, internal policy that mandated Defendant to reject Scott.

5. Because Defendant can conduct its business in compliance with the MHRA and applicable FDA regulations, its conflict preemption argument (raised in this Court for the second time) is unavailing.

6. Defendant's invocation of the primary jurisdiction doctrine is likewise misguided. Defendant cannot obtain summary judgment under the doctrine, and the FDA has no jurisdiction to resolve any issue at play in this case. It is the role of this Court, not the FDA, to construe and apply Minnesota law, and that is the

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[1] Gender identity (one's internal sense of being male or female) and sexual orientation (one's physical or emotional attraction to others) are two different things; they both, however, fall under the term "sexual orientation" as defined by the MHRA; neither dictates any particular sexual behavior.

only expertise needed to decide this matter.

FACTS

The following facts, taken from the record of potentially admissible evidence, and viewed the in the light most favorable to Scott, are germane to the reasons why this Court should deny Defendant's motion for summary judgment.

The Intended Business Transaction

In the afternoon of November 17, 2008, Scott sought to do business with Defendant; she intended to donate her plasma in exchange for much-needed cash.[2] She went to Defendant's place of business, near the University of Minnesota, where Defendant purchases plasma from individuals.[3][4] After she arrived and filled out some paperwork, an employee of Defendant confirmed that Scott was physically capable of selling her plasma to Defendant.[5]

Defendant's Refusal to Do Business with Scott

After Defendant determined Scott was physically able to donate plasma, it directed her to meet with a staff nurse, Ms. Tina Erickson. The purpose of this meeting was to assess Scott's suitability as a Donor; that is, to determine whether any legitimate basis existed to reject Scott from selling her plasma.[6]

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[2] Declaration of Andrew Muller in Opposition to Defendant's Motion for Summary Judgment ("Muller Dec.") Ex 1., pp. 101:20—102:15, 106:1—107:4

[3] Id.

[4] Muller Dec. Ex. 2, p. 21:5-9

[5] Muller Dec. Ex. 1, pp. 110:8—111:14, 126:14-25

[6] Muller Dec. Ex. 1, pp. 111:24—112:9; Ex. 2 pp. 36:12—37:3

During this meeting, Erickson, acting on Defendant's behalf, made the decision to reject Scott.[7]

There is no dispute that Erickson was the sole decision-maker. Still, Defendant misleadingly suggests that she made the decision in consultation with a medical director or other medical authority, as its policy required.[8] But Erickson insists she made the decision independently; that she was the sole decision-maker; that she did not consult with any medical supervisor; and, she did not contact Defendant's medical operations center.[9] Because Erickson was the sole decision-maker, only her state of mind is relevant to the issue of Defendant's motive for refusing to do business with Scott.[10]

Direct Evidence of Discriminatory Motive

At her deposition, Erickson provided testimony that directly shows discriminatory motive. She testified that she made the decision to reject Scott because Scott is transgender.[11] Scott likewise testified that Erickson told her Defendant would not purchase her plasma because of her transgender status.[12] Scott also recounted that Erickson made statements reflecting unfounded assumptions about Scott's lifestyle simply because she is transgender.[13] For example, she falsely accused Scott of having had sex with a man, and taking too many drugs.[14]

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[7] Muller Dec. Ex. 1, pp. 112:13—113:13; Ex. 2 pp. 93:4-94:4

[8] Def. Memo. pp. 2-3

[9] Muller Dec. Ex. 2, pp. 104:16-21; 107:6-8, 108:4-7

[10] At the time she rejected Scott, Erickson had received no anti-harassment training, and Defendant never provided her with such training as it pertains to potential donors or transgender persons. (Muller Dec. Ex. 2 pp. 47:23—48:15).

[11] Muller Dec. Ex.2, pp. 107:9-16

[12] Muller Dec. Ex. 1, pp. 112:13—113:23, 114:9-20, 129:21-25, 141:18-142:23

Erickson provided other testimony tending to confirm that Scott's transgender status, as opposed to any medically-related risk factor, was the basis for Defendant's decision. Erickson testified that she had no discussion with Scott about risky behaviors that would justify a deferral.[15] She also confirmed that she had no reason to believe Scott had AIDS or HIV, or that Scott had engaged in any of the behaviors the FDA recognizes as being a legitimate basis for deferring a potential plasma donation.[16]

Defendant's Lack of a Legitimate Non-Discriminatory Reason

In addition to testifying that Defendant rejected Scott because of her transgender status, Erickson offered several other explanations in an effort to legitimize Defendant's actions. First, she stated that Defendant's policy mandated deferral because Scott was taking female hormones as part of her gender reassignment.[17] But, in November 2007, Defendant had no such policy. At that time, its policy stated that use of estrogens and androgens was acceptable, and it had no policy addressing the use of hormones as related to gender reassignment surgery.[18] Thus, Erickson could not have been acting pursuant to Defendant's policy when she rejected Scott.

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[13] Muller Dec. Ex. 1, pp. 112:13—113:17
[14] Id.
[15] Muller Dec. Ex. 2, pp. 104:12-15
[16] Muller Dec. Ex. 2, pp. 111:20—113:10
[17] Muller Dec. Ex. 2, pp. 103:2-7, 104:1-3

Second, Erickson testified that Defendant rejected Scott because it believed her use of estrogen was "hard on her system" and that she could suffer an adverse reaction if permitted to donate plasma.[19] Erickson also claimed that she counseled Scott about these risks at the time of the deferral; she even created a document after the fact reflecting this alleged counseling.[20] According to Dr. Simon, Defendant does not regard taking opposite sex hormones as a risk factor prohibiting donation, and Erickson's explanation is inaccurate—in other words, it's false.[21] At her deposition, Erickson admitted that her claims of having legitimate donor-safety concerns and counseling Scott about them could not possibly be true.[22]

Third, Erickson claimed that she was following a company policy that stated any person who had gender reassignment surgery was ineligible to donate plasma.[23] But, at the time, Defendant's had no policy requiring a *per se* exclusion of a donor because of gender reassignment surgery.[24] Instead, under the policy in place, Erickson was required to contact a corporate medical authority to assess whether Scott's specific history might provide a basis for deferral.[25] Erickson did not follow Defendant's policy; she failed to contact the corporate medical center before rejecting Scott's business.[26] Had Erickson followed protocol, Scott likely would have been allowed to donate plasma: at the time, Defendant had yet to ban all transgender donations; and, Defendant had purchased plasma from at least one transgender person in the past.[27]

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[18] Muller Dec. Ex. 2, pp. 77:19—78:22 and Willing Declaration in Support of Defendant's Motion for Summary Judgment ("Willing Dec.") Ex. J at 567, ¶23.28 and 563, ¶22.16
[19] Muller Dec. Ex. 2, pp. 103:8-14, 111:4-7
[20] Muller Dec. Ex. 2, pp. 101:6—102:1
[21] Muller Dec. Ex. 3, pp. 18:19—19:23
[22] Muller Dec. Ex. 2, pp. 111:4-15
[23] Muller Dec. Ex. 2, pp. 105:8-16
[24] Muller Dec. Ex 2, p. 106:9-25; Ex. 3, pp. 46:16-47:8, and Willing Dec. Ex. J at 567, ¶23.28

Fourth, Erickson claimed she deferred Scott because she was uncertain about which set of screening questions she should ask her (male or female), and that she discussed that issue with Scott at the time.[28] Scott denies that Erickson ever stated this reason to her; she insists Erickson cited her transgender status, and only her transgender status, as the reason for rejecting her business.[29] Further undercutting Erickson's assertion, although she failed to assess Scott's medical history, she knew that she had never had sex with a man because Scott told her so[30]; she obviously knew that Scott wasn't pregnant; and, she admittedly did not even try to ask her any gender specific questions.[31] Under these facts—when there was no question about how to apply gender-specific criteria to a transgender person—Defendant's own expert acknowledges it would be appropriate to proceed with the donation.[32]

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[25] Muller Dec. Ex. 3, pp. 46:16—48:15
[26] Muller Dec. Ex. 2, pp. 107:6-8
[27] Muller Dec. Ex. 3, pp. 55:4-24, 76:6-20
[28] Muller Dec. Ex. 2, pp. 103:15-104:1
[29] Muller Dec. Ex. 1, p. 142:2-23
[30] Muller Dec. Ex. 1, pp. 146:11-22, 147:25-148:12
[31] Muller Dec. Ex. 2, p. 104:4-11

Despite ample evidence of Erickson's (and thus Defendant's) discriminatory motive, Defendant seeks to legitimize its actions by citing FDA regulations, recently obtained expert opinions, hundreds of pages of extraneous material, and policies that did not exist in November 2008. In assessing this case, it's important not to overlook the obvious: none of this information was available to Erickson in 2008. To the extent Defendant has offered evidence of its motive at the time of the decision, that evidence consists of Erickson's testimony outlined above; its written response to the MDHR; and, its answers to Scott's interrogatories.

In its response the MDHR, Defendant stated that its decision was made in conformity with the HHS's 1992 Blood Memo, and highlighted the MSM deferral policy (prohibiting any man who has had sex with a man from donating plasma).[33] And it confirmed that when it refused to do business with Scott neither the FDA nor Defendant had a policy mandating deferral of transgender donors simply because they were transgender.[34] In its response to Scott's interrogatories, it confirmed that Erickson made the decision, and it added that she "relied on Defendant's donor eligibility and screening policies, which were developed by the Defendant's medical staff in light-of then existing FDA policies."[35]

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[32] Muller Dec. Ex. 4, p. 106:2—107:20
[33] Muller Dec. Ex. 5, pp. 7-8
[34] Muller Dec. Ex. 5, p. 8

At least four other key facts are relevant to refuting Defendant's legitimate-purpose argument. First, as acknowledged by Defendant in its response to the MDHR, the FDA has never mandated deferral of donations from transgender persons; in November 2008, Defendant had no policy mandating deferral of all transgender individuals;[36] thus, if it were to accept Scott's donation, it would not have violated any federal law or FDA recommendation.[37] Second, contrary to Defendant's assertion, federal regulations do not require it to verify the gender of a potential donor. The regulations only require that Defendant have a system to positively identify each donor. (21 CFR § 640.65(3)). Third, and also contrary to Defendant's argument, the FDA does not mandate any particular gender-specific donor history questions, nor does it require that all potential donors be asked if they are pregnant. To wit, the FDA's recent directive on the subject specifically states "the FDA's guidance documents, including this document, do not establish legally enforceable responsibilities."[38] It also clarifies that the FDA does not have any requirements obligating Defendant to ask questions about pregnancy.[39] Fourth, although Defendant insists it must consider a donor's sexual orientation under federal law, the FDA counsels taking the opposite approach: it directs businesses such as Defendant to make donor suitability decisions based on "behavior and not stereotypes" and "without judgment about a donor's sexual orientation."[40]

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[35] Muller Dec. Ex. 6, (Answer to Int. No. 8)
[36] Muller Dec. Ex. 3, pp. 46:16-47:8, and Willing Dec. Ex J at 567, ¶23.28
[37] Muller Dec. Ex. 4, p. 86:4-18
[38] ECF-58-4 at 1
[39] Id at 7

Plaintiff's Charges and Allegations

On April 29, 2009, approximately five months after Defendant refused to do business with her, Scott filed a charge of discrimination with MDHR.[41] Then, on October 23, 2009, 11 months after Defendant's alleged discrimination, she filed an amended charge of discrimination.[42] Just 8 months later, the MDHR found probable cause to believe Defendant had discriminated against Scott when it refused to do business with her because of her "sexual orientation"—being transgender—and that Defendant had no legitimate reason for its actions.[43]

On July 31, 2013, we withdrew Scott's charge of discrimination to file this lawsuit. Less than 60 days later, we initiated this lawsuit. In her complaint, Scott alleges Defendant violated Minn. Stat. § 363A.17 by refusing to do business with her[44]; that Defendant acted through Tina Erickson[45]; that Defendant discriminated against her because of her "sexual orientation," as defined by the MHRA to include "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or

[40] ECF-58-3, p.46 of 175; Muller Dec. Ex.7, p.2
[41] Willing Dec. Ex. U
[42] Willing Dec. Ex. V
[43] Willing Dec. Ex. W
[44] ECF-18, ¶15
[45] Id. at ¶¶12-14

femaleness".[46] Significantly, she does not assert that Defendant's discrimination resulted from a facially discriminatory policy; she does not assert that the FDA's policy or guidance led to the discrimination; nor does she assert that disparate-impact discrimination. She asserts only a claim of disparate treatment--discrimination carried out by one person, Erickson, acting on behalf of Defendant.

ARGUMENT

A. This Suit is Timely Because the MDHR Found Probable Cause in Just Eight Months.

In *Beaulieu*, the Supreme Court of Minnesota held that the MHRA requires the MDHR to make a probable-cause determination within 12 months. *Beaulieu v. RSJ, Inc.*, 552 N.W.2d 695, 701-02 (Minn. 1996). It also held that "where the MDHR fails to make a determination of probable cause within 12 months after the filing of a charge" the respondent may be entitled to some remedy if it shows prejudice. *Id.* at 702-03. Finally, the Court concluded that "probable cause determinations made 31 months or more after a charge is filed are per se prejudicial to the respondent, requiring dismissal of the complaint." *Id.* at 703.

In this case, Defendant seeks dismissal of Scott's case by invoking the "per se prejudicial" rule of *Beaulieu*. But that rule applies only in instances where the MDHR fails to determine probable cause after 31 months.[47] In this case, Scott filed her amended charge of discrimination within a year of Defendant's refusal to do business, and the MDHR found probable cause just 8 months later. Because the MDHR made its finding before the 12-month deadline, and certainly before 31 months had passed, the facts before this Court have nothing in common with the facts of *Beaulieu*. Consequently, the "per se prejudicial" rule does not apply to the facts of this case; Defendant is not entitled to finding of prejudice per se; nor is it entitled to the remedy of dismissal.

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[46] Id. at ¶¶24-25

[47] No Court has invoked the "per se prejudice" rule of *Beaulieu* to dismiss a case where the MDHR (or EEOC) made a probable cause finding in less than 31 months.

B. The MHRA Applies to Defendant's Plasma Collection Business.

Defendant previously tried and failed to convince this Court that its practice of purchasing plasma falls outside the anti-discrimination provisions of Minn. Stat. § 363A.17.[48] Because it now makes essentially the same losing arguments, there is no reason for this Court to reevaluate its prior ruling on this issue. Nonetheless, we address below reasons why this Court should again rule that Defendant must comply with the MHRA.

Defendant suggests that because it refers to the sale of plasma as a "donation," its business does not involve a commercial transaction. As it applies to selling plasma, the term "donation" is a euphemism that courts readily ignore in favor of reality. *See Green v. Commissioner of IRS*, 74 T.C. 1229, 1234-35 (1980). In *Green*, the U.S. Tax Court determined that donations of plasma involve "the sale of a tangible product." *Id.* at 1234. Thus, a taxpayer who makes

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[48] See ECF-35 (Order Denying Defendant's 12(c) Motion to Dismiss).

"donations" of plasma for money is "engaged in the continual and regular process of producing and selling blood plasma to the lab for profit." *Id.* at 1235.

In urging the Court to exclude its business from the MHRA, Defendant asserts that Scott could not have been seeking to sell her plasma because "the sale of blood or plasma by an individual is illegal in the United States." In support of this argument, Defendant mistakenly cites the National Organ Transplant Act, 42 U.S.C. § 274e. This federal law prohibits the trafficking of human organs, but it does not prohibit the sale of plasma. *Flynn v. Holder*, 665 F.3d 1048, 1054 (9th Cir. 2011) ("Since payment for blood donations has long been common, the silence in the National Organ Transplant Act on compensating blood donors is loud. 'Blood' is omitted from the list of examples of 'human organs' in the statute and the regulation... Neither the statute nor the regulation defines 'human organ' to include blood.").

Defendant also asserts that the Minnesota Uniform Anatomical Gift Act, Minn. Stat. § 525A.25, evinces the legislature's intent to exclude the practice of purchasing and selling plasma from being "a trade," "a business," or "the provision of a service," as used in Minn. Stat. § 363A.17. Again, Defendant's argument fails because the Anatomical Gift Act has no application to Defendant's business.

Minn. Stat. § 525A.25 speaks only to the provision of blood "for purposes of injection, transfusion, or transplantation." Defendant purchases "source plasma" from donors. "Source plasma" by definition excludes: "single donor plasma products intended for intravenous use." 21 C.F.R. § 640.60. Because source plasma is not intended for intravenous use, the language of Minn. Stat. § 525A.25 does not govern Defendant's business. Thus, as this Court previously determined: "[N]othing in Minn. Stat. § 525A.25 exempts CSL from complying with Minnesota's anti-discrimination statutes."[50]

Based on an erroneous premise—that Defendant's practice of purchasing plasma is exempt from the MRHA—Defendant mistakenly concludes that Scott cannot show she is an "aggrieved person" under the Act. The overarching purpose of the Act is to ensure freedom from discrimination for all persons in Minnesota. (Minn. Stat. § 363A.02). It does so, in part, by prohibiting a business, like Defendant, from intentionally refusing to do business with a person, like Scott, because of her sexual orientation, unless her sexual orientation is a legitimate reason for the refusal. (Minn. Stat. § 363A.17). And it confers the right to sue upon "any person aggrieved by a violation of [the Act]." (Minn. Stat. § 363A.28, subd.1). Thus, simply being the target of a discriminatory act is a sufficient injury-in-fact to confer standing upon Scott, unless the law requires more. *See Potter v. LaSalle Court Sports & Health Club*, 384 N.W. 873, 875 (Minn. 1986).

By this lawsuit, Scott seeks to enforce her right under the MHRA to do business free from unlawful discrimination. (She is not asking the Court to recognize a right to donate plasma in the abstract). As discussed further below, the evidence supports a finding that Defendant refused to do business with Scott solely because of her "sexual orientation"—her transgender status—and without a legitimate purpose. Because Scott was the target of Defendant's intentional discrimination, and because she needn't show more to prove her case, she is an "aggrieved person" within the meaning of the MHRA.

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[50] ECF-35 at 6.

C. Plaintiff Needn't Prove the Existence of a Contract to Sue Defendant for Its Unlawful Refusal to Do Business With Her.

Defendant mistakenly cites the Minnesota Supreme Court's holding in *Krueger v. Zeman Const. Co.* as support for its argument that Minn. Stat. § 363A.17 requires Scott to prove the existence of a contract.[51] When the Supreme Court's opinion is read in conjunction with the Minnesota Court of Appeals' opinion it affirmed, it becomes clear that a proof-of-contract requirement does not apply to Scott's business-refusal claim.

In *Krueger,* the Minnesota Court of Appeals recognized that Minn. Stat. § 363A.17(3) prohibits a business from discriminating against a person because of her gender in three separate ways: by intentionally refusing to do business with her; by refusing to contract with her; or, by discriminating in the terms or performance of an existing contract. *Krueger v. Zeman Const. Co.*, 758 N.W.2d 881, 886 (Minn. App. 2008) (noting that the plaintiff did not claim the defendant had discriminated against her by intentionally refusing to do business with her

[51] ECF-57 at 17-19

or by intentionally refusing to contract with her, "either of which constitutes an unfair discriminatory practice under the first two clauses of section 363A.17(3)."). In interpreting the statute, the court gave separate effect to each clause, and noted that proof of a contract applied only to actions alleging discrimination in the performance of a contract: "Using the plain-meaning analysis, we agree with appellant that the first two clauses of section 363A.17(3) do not require a contractual relationship to confer standing to bring a business-discrimination action because, in those circumstances, the defendant intentionally refuses to enter into such a relationship." *Id.* at 886-87. Because *Kruger* involved a claim of discrimination in the performance of a contract (a claim asserted under the third clause of section 363A.17(3)), the Minnesota Supreme Court's holding, that a contractual relationship is required to proceed under section 363A.17(3), is constrained to claims asserting discrimination in the performance of a contract. *See Krueger v. Zeman Const. Co.,* 781 N.W.2d 858 (Minn. 2010) ("We hold that Minn. Stat. § 363A.17(3) requires that a plaintiff have a contractual relationship with a defendant to have a cause of action for business discrimination in the performance of that contract.").

Scott's refusal-to-do-business claim is predicated on the first clause of section 363A.17(3). Accordingly, she needn't prove the existence of a contract to hold Defendant liable for its unlawful actions. Because the holding of *Krueger,* requiring the existence of a contract, does not apply to Scott's refusal-to-do-business claim, the lack of a contract between her and Defendant is not a basis to grant Defendant's motion for summary judgment.

D. Evidence of Defendant's Discriminatory Motive and Lack of Legitimate Non-Discriminatory Reasons Precludes Summary Judgment.

Scott's business-discrimination claim is analyzed in much the same way as a claim arising under Title VII. *See Wayne v. Mastershield, Inc.*, 597 N.W.2d 917, 921 (Minn. App. 1999) ("In interpreting cases under the [MHRA] we give strong weight to federal court interpretations of Title VII claims…."). But, unlike in Title VII cases, neither the mixed-motive analysis nor the "same-decision defense" applies to MHRA claims. *Anderson v. Hunter, Keith, Marshall & Co.*, 417 N.W.2d 619, 626-27 (Minn. 1988); *McGrath v. TCF Bank Savings*, 502 N.W.2d 801, 806 (Minn. App. 1993) (aff'd as modified, 509 N.W.2d 365 (Minn. 1993)).

Scott can defeat Defendant's motion for summary judgment in two ways. First, she can rely on direct evidence of Defendant's discriminatory motive. The term "direct evidence" is synonymous with "strong evidence," and when a plaintiff marshals strong evidence to support her claims the case should proceed to a jury. *See Griffith v. City of Des Moines*, 387 F.3d 733, 736 (8th Cir. 2004) ("A plaintiff with strong (direct) evidence that illegal discrimination motivated the employer's adverse action does not need the three-part *McDonnell Douglas* analysis to get to the jury, regardless of whether his strong evidence is circumstantial."). Second, she can use indirect evidence showing that

Defendant's proffered non-discriminatory reasons are a pretext for discrimination. Although the indirect method often requires a court to engage in a prima facie case analysis, the Court needn't do so here, because Defendant has articulated at least one purported non-discriminatory reason (through Erickson's testimony, its response to the MDHR, and its answers to interrogatories).[52] *See U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983 ("Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant."). Accordingly, once the record is fully developed, this Court should proceed directly to the ultimate question of discrimination "*vel non.*" *See Torgerson v. City of Rochester*, 643 F.3d 1031, 1054 (8th Cir. 2011) (Colloton, Circuit Judge, concurring).

1. Direct evidence showing Defendant's discriminatory motive precludes summary judgment.

In the context of this case, direct evidence refers to facts "showing a specific link between the alleged [sexual orientation/gender identity] animus and the [Defendant's refusal to do business with Scott], sufficient to support a finding by a reasonable [juror] that [Scott's transgender status] actually motivated" Defendant's refusal. *See Torgerson v. City of Rochester*, 643 F.3d 1031, 1044 (8th Cir. 2011). Although rare, statements of a decision maker showing

[52] There is another reason to eschew the prima facie case analysis. In support of its motion for summary judgment, Defendant has not argued that Scott lacks evidence of a prima facie case.

discriminatory motive and directly related to the decision making process are direct evidence. *Simmons v. New Republic School Dist. No. 8*, 251 F.3d 1210, 1215 (8th Cir. 2001).

In the present case, Erickson, and only Erickson, made the decision to reject Scott's plasma donation. At her deposition, Erickson admitted that she based this decision on Scott's transgender status:

> Q. Aside from Lisa Scott had you ever had an occasion to defer another individual based on their transgender status?
> A. No.
> Q. This is the only deferral you've made because someone was transgender or had gender reassignment surgery?
> A. Yes.[53]

At her deposition, Scott confirmed that Erickson told her she was rejected for being transgender.[54] Evidence of unlawful motive does not get any more direct than it is here. Because Erickson, the sole decision maker, has admitted to relying on Scott's transgender status as the basis for Defendant's refusal to do business, Defendant's motion for summary judgment must be denied.

2. Indirect evidence showing that Defendant's purported legitimate non-discriminatory reasons are actually a pretext for discrimination precludes summary judgment.

In addition to using direct evidence of discrimination to make her case, Scott can rely on indirect evidence to show that Defendant's purported legitimate, non-discriminatory reasons have "no basis in fact" are "unworthy of credence" and a pretext for discrimination. *See Torgerson*, 643 F.3d at 1055. This evidence

[53] Muller Dec. Ex. 2, pp. 107:9-16
[54]Muller Dec. Ex. 1, pp. 112:13—113:23, 114:9-20, 129:21-25, 141:18-142:23

is particularly probative when combined with legitimate suspicions about a decision maker's "mendacity." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993) For example, indirect evidence showing pretext may include a defendant's false testimony that a policy mandated it to take an adverse action against the plaintiff. *See Wallace v. DTG Operations, Inc.*, 442 F.3d 1112, 1123 (8th Cir. 2006) ("Viewed in the light most favorable to [the plaintiff], a reasonable jury could find that [the defendant's] adverse and selective application of the policy to be evidence that [the defendant's] reliance on the policy was merely a pretext to hide a retaliatory motive.").

Although Defendant needn't prove its asserted non-discriminatory reasons for refusing Scott's business, it still must meet a burden of persuasion. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). In meeting that burden, Defendant "must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection." *Id.* "An articulation not admitted into evidence will not suffice. Thus, the defendant cannot meet its burden merely through an answer to the complaint or argument of counsel." *Id.* at fn9.

Here, in an attempt to meet is burden of persuasion, Defendant mistakenly seeks (at least, in part) to rely on expert testimony regarding recent draft FDA guidance and about policies it enacted after its refusal to do business with Scott. Because Scott is not alleging that Defendant's discrimination was the result of a facially discriminatory policy, this expert testimony and these recent policies are not admissible to show Defendant's motive. This purported evidence is simply an argument of counsel or post-hoc rationalizations that could not have motivated Defendant's conduct on the day in question. Thus, in assessing Defendant's professed legitimate non-discriminatory reasons, the Court need only consider Erickson's testimony, Defendant's answers to interrogatories, Defendant's response to the MDHR, and Defendant's policy as it existed on the date of the alleged discrimination.

Here, as in *Wallace,* Defendant disingenuously invokes policies in an effort to legitimize its actions and hide its true motive. At her deposition, Erickson falsely testified that she deferred Scott because Defendant's policies mandated the deferral. In fact, Defendant had no policy of deferring donors because they used estrogen or because they had undergone gender reassignment surgery. Under Defendant's then-existing policy, Scott was not automatically deferred on the basis of her sexual orientation/gender identity. (In fact, under that policy, Defendant had purchased plasma from at least one other transgender donor). At the time of the discrimination, Erickson was required to consult with corporate medical operations before rejecting Scott. But she did not follow that policy. Instead, she independently decided to refuse Scott's business. In doing so, she made statements reflecting discriminatory bias—she automatically assumed that Scott must have a history of MSM sex and drug use because of Scott's transgender status. Then, she lied about the applicable policies, and she sought to invoke non-existent policies, to legitimize Defendant's actions. Accordingly, a jury could infer that Erickson was not motivated by a legitimate reason, and she is lying to cover up her (and thus, Defendant's) true discriminatory motive.

In responding to the MDHR and in answering Plaintiff's interrogatories, Defendant followed Erickson's tactic of falsely invoking non-existent policies—its own and the FDA's—as if they mandated its discriminatory treatment of Scott. Like Erickson, Defendant cannot legitimize its actions by citing to internal policies that did not exist. Nor can it invoke FDA policies, like the 1992 Blood Memo, which are silent on the issue of transgender donors. Indeed, Defendant concedes that it had no blanket exclusion of accepting transgender donors in November 2008. And it admits that the FDA has never banned transgender donors. To the contrary, the FDA directs Defendant to make decisions about a donor's suitability based on risk, as shown by her past behavior, and not based upon her sexual orientation. Because Defendant had no basis to suspect that Scott had engaged in any of the behaviors the FDA recognizes as being a legitimate basis for deferral, its attempt to invoke the FDA's guidance is particularly suspicious. Thus, a reasonable jury could conclude Defendant is lying to cover up its discriminatory motive.

Other parts of the record showing pretext and supporting an inference of unlawful discrimination include the following: Erickson's false testimony that Defendant was worried about Scott's health, and that she counseled her about the dangers associated with using estrogen and donating plasma; Erickson's testimony that, despite knowing Scott's male-to-female transgender status and

Scott's history of no sexual contact with a man, she could not assess whether Scott was pregnant, or if she had ever engaged in MSM sex; Defendant's false assertion that the FDA mandates it to ask gender-specific questions, including questions about pregnancy; and Defendant's assertion that Erickson consulted with its corporate medical operations before deferring Scott (as its then existing policy required), when it knows for a fact that she did not.

E. Defendant's Pre-Emption Argument Fails Because the MHRA Does Not Conflict with Any Federal Law or Regulation.

In seeking summary judgment on the grounds of FDA preemption, Defendant regurgitates the same arguments that this Court earlier rejected.[55] As with Defendant's other attempts to make losing arguments into winners, there is no reason for this Court to rule any differently than it did before. Still, to make a record of our position, we respond to Defendant's arguments below.

State law must give way to federal rule in three situations: express preemption, implied preemption,[56] and conflict preemption. *Hillsborough County Florida v. Automated Laboratories, Inc.*, 471 U.S. 707, 713 (1985). In *Hillsborough County*, the Court ruled that local laws regulating the business of plasma collection are neither expressly nor impliedly preempted by FDA regulations. *Id.* ("Given the clear indication of the FDA's intention *not to pre-empt* and the deference with which we must view the challenged ordinances, we conclude these ordinances are not pre-empted by the federal scheme."). Thus, to

[55] ECF-35 (Order Denying Defendant's 12(c) Motion to Dismiss).
[56] "Field preemption" is another term for "implied preemption."

prevail on its motion, Defendant must show an actual conflict—that "compliance with both the [FDA's regulations] and [the MHRA] is physically impossible." *Id.* at 713 (quoting, *Florida Lime & Avocado Growers Inc. v. Paul*, 373 U.S. 132, 142-43 (1963)).

Defendant cannot meet this burden because there is no FDA guidance, policy, or rule, mandating the deferral of a person simply because of her sexual orientation or her transgender status. Defendant can easily comply with both Minnesota's prohibition against discrimination and federal regulations governing plasma collection. The laws have different goals, but they are not contradictory; they actually compliment one another by virtue of their similar requirements. Under the MHRA as well as the FDA rules, Defendant cannot use an individual's "sexual orientation" as defined by the MHRA as a proxy for donor suitability.

In Minnesota, Defendant cannot refuse to do business with an individual because of her "sexual orientation" unless it has a legitimate non-discriminatory reason. Minn. Stat. § 363A.17(3). Thus, when Defendant refuses to purchase blood from an individual because of his or her sexual orientation or gender identity alone, it commits an act of unlawful discrimination. *Cf. Johnson v. Plasma Alliance*, No. C2-99-1261, 2000 WL 665603, *4 (Minn. Ct. App. May 23, 2000) (interpreting similar language under the Minneapolis Civil Rights Ordinance regarding sexual orientation and gender identity and noting that it would find unlawful discrimination when "a celibate homosexual man was not allowed to donate plasma because of his homosexuality."). The FDA protects the nation's plasma supply in a way that closely resembles Minnesota's effort to prevent unlawful discrimination—by directing Defendant to make decisions about a donor's suitability based on factors other than gender identity or sexual orientation.

Defendant ignores this similarity, and wrongly asserts that a finding in favor of Scott would be tantamount to a "judicial pronouncement that CSL Plasma is required to accept donors without regard to their sexual orientation" and would "stand in the way of the federal goal of protecting the nation's blood supply." But the FDA's policy plainly states that Defendant should make donor decisions without regard to their sexual orientation:

> Appropriately trained blood establishment personnel should talk with each prospective donor about risk factors. The focus should be on behavior and not stereotypes. For example, many men who have had male-to-male sexual experiences do not identify themselves as "homosexual," "gay," or "bisexual," but would identify with the description "sex with another man." [58]

If this long-standing policy pronouncement were not clear enough, the FDA's most recent "question and answer" document makes it so:

> Q. Is the FDA's policy of excluding MSM donors discriminatory?

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[58] ECF 58-3 at p.46 of 175 (*Revised Recommendations for the Prevention of Human Immunodeficiency Virus (HIV) Transmission by Blood Products* (1992))

[60] Muller Dec. Ex.7 (*Questions about Blood Donations from Men Who Have Sex with Other Men*).

A. FDA's deferral policy is based on the documented increase of certain transfusion transmissible diseases, such as HIV, associated with male-to-male sex and is not based any judgment concerning the donor's sexual orientation.[60]

Because the FDA does not mandate deferral of potential donors simply because they are transgender, but instead requires Defendant to make donor eligibility decisions "not based on any judgment concerning the donor's sexual orientation," Defendant's assertion that to meet federal blood-safety goals it must consider a donor's "sexual orientation" is unavailing. And its preemption argument, based on this misunderstanding of FDA requirements, is wholly unpersuasive. It is entirely possible for Defendant to abide by both the MHRA and the FDA's rules; compliance with one actually begets compliance with the other. In fact, had Defendant followed the FDA's risk-based protocol, it would not have refused to business with Scott. Given the absence of any conflict, Defendant's request for dismissal on preemption grounds must be denied.

F. Defendant Cannot Obtain Summary Judgment With Prejudice Under the Primary Jurisdiction Doctrine.

The "primary jurisdiction" doctrine is not a proper vehicle for obtaining summary judgment and dismissal with prejudice; the best a defendant can hope for is either a stay with an agency referral or a dismissal without prejudice. *See Access Telecommunications v. Southwestern Bell Tel. Co.*, 137 F.3d 605, 609 (8th Cir. 1998). (If the doctrine applies, the "district court has discretion [either to stay the case] and retain jurisdiction, or if the parties would not be unfairly disadvantaged, to dismiss the case without prejudice."). Moreover, the doctrine applies only in instances where resolution of an issue requires the "special competence of an administrative body." *Alpharma, Inc. v. Pennfield Oil Co.*, 411 F.3d 934, 938 (8th Cir. 2005). There is no basis for a court to invoke the primary jurisdiction doctrine when deciding a claim that calls upon the court to apply standards "within the conventional competence of the courts" and "the judgment of a technically expert body is not likely to be helpful." *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 305-306 (1978).

Besides not being a proper basis to request entry of summary judgment against Scott, there are other reasons why Defendant's reliance on the primary jurisdiction doctrine is misplaced. First, the doctrine does not apply because there is no role for the FDA to play in deciding the issue of Defendant's motive. Scott is not challenging the validity or application of any FDA rule or guidance as applied to her. Her claims of disparate treatment implicate no FDA policy because Erickson, the lone decision maker, admits she did no rely on the FDA's MSM policy (or any other risk factor recognized by the FDA) as a basis for refusing to do business with Scott. Second, the FDA has no jurisdiction over cases arising under the MHRA. If referral to any agency were appropriate, the MDHR is the only agency with the requisite expertise. And it has already determined that Defendant violated Scott's rights under the MHRA. Consequently, this Court should reject Defendant's attempt to obtain summary judgment by invoking the primary jurisdiction doctrine.

CONCLUSION

This case is about one decision, made on one day, by one person. Assessing the motive behind that decision implicates only Erickson's state of mind. Facts from the record, including direct evidence, demonstrate that Erickson rejected Scott solely because of her transgender status. Determining the lawfulness of that decision involves Minnesota law. Under Minnesota law, Defendant is not entitled to have Scott's claims dismissed as untimely. Nor can it prevail on having her failure-to-do-business claim thrown out simply because there was no contract. And, as this Court previously determined, Defendant must comply with the MHRA; there is no federal preemption; and, there is no basis to invoke the primary jurisdiction doctrine. Therefore, we respectfully requests that this Court deny Defendant's motion for summary judgment.

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